
(1992) 10 KL CK 0003
In the High Court Of Kerala
Case No : A.S. No. 368 of 1988

Krishnan Namboodiri and others

APPELLANT

Vs

Padmanabhn Nemboodiri and others

RESPONDENT

Date of Decision : 01-10-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3

Citation : (1993) 1 KLJ 452

Hon'ble Judges : G. Rajasekharan, J

Bench : Single Bench

Advocate : V. Sankara Raja, for the Appellant; K.T. Sankaran and N. Subramanyan, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasekharan, J.—Plaintiffs 2, 5, 6, 7 and 9 in a suit for partition are the appellants. The suit was for partition of the plaint schedule properties into 17 shares and allotment of 9 shares to the plaintiffs. The 3rd defendant Narayanan Namboodiri is alleged to have relinquished his share in favour of the other members of the illom and that was the reason why division of the property into 17 shares were sought even though there were 18 members in the illom. Pending the suit the counsel appealing for the parties effected a compromise by making an endorsement on the plaint itself agreeing to divide the property into 18 shares and allotment of one share each to the parties excepting defendants 3 and 4. No share was allotted to the third defendant. 4th defendant was allotted two shares. One of the properties scheduled to the plaint was left out of partition saying that it exclusively belonged to the 5th defendant.

2. The compromise decree is challenged by the appellants mainly on the ground that the decree and compromise violates Order XXIII Rule 3 of the C P. C. Reliance was placed on the decision reported in Sukumaran v. Union of India (1991 (1) KLT 292). Considering the scope of the amended provisions of Order XXIII Rule 3 and the insertion of the words "in writing and signed by the parties"

by Amendment Act 104 of 1976 the learned Judge held that:-

Order 23 Rule 3 provides that where the suit is adjusted wholly or in part by any lawful agreement or compromise it should be in writing and signed by the parties. The words "in writing and signed by the parties" were added by C. P. C Amendment Act 104 of 1976. Prior to the amendment the legal position was that the advocate enjoyed implied authority to enter into a compromise binding on his client. Such power stands crippled now in view of the Amendment Act 104 of 1976. As the law stands now, the essential requirement of a compromise is that it should be effected by a written document signed by the parties. Though the advocate can give any undertaking on behalf of his client before the Courts he cannot compromise a suit by withdrawing the defense contention without it being recorded in writing and signed by his client. Though the advocate engaged by a party can represent him throughout the proceeding. Order 23 Rule 3 imposes, restriction in the advocate's power in compromising the suit. In view of the Rule that a compromise should be in writing and signed by the parties, the advocate cannot on his own endorsement withdraw defense contentions and compromise the suit. At Rule 3 specifically envisages compromise of the suit or proceeding only by writing and signed by parties, endorsement by the advocate withdrawing defense contentions is of no significance and not binding on the party.

3. Going by the law laid down in the above decision, the appellants have to win. The question is whether the above decision lays down the correct law on the point.

4. The learned counsel for the respondents has referred to the decision *Byram Pestonji Gariwala Vs. Union Bank of India and others*, rendered by the Supreme Court. There, the law as amended by Act 104 of 1976 was considered and it was ruled that the expression "signed by the parties" only means signed by the parties or their agents or counsel. It was further held the advocate appearing for the party has the authority to represent the party in compromise. The dictum reads as follows:-

The counsel's role in entering into a compromise has been traditionally understood to be confined to matters within the scope of the suit. However, a compromise decree may incorporate not only matters falling within the subject matter of the suit, but also other matters which are collateral to it. The position before the amendment in 1976 was that, in respect of the former, the decree was executable, but in respect of the latter, it was not executable, though admissible as judicial evidence of its contents. After the amendment of 1976, a consent decree, as seen above, is executable in terms thereof even if it comprehends falling outside the subject-matter of the suit, but concerning the parties. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of proceedings in Court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognized agent and his principal is a matter of contract; and with the freedom of contract

generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognized and universally acclaimed common law tradition of as ever alert, independent and active Bar with freedom to maneuver with force and drive for quick action in a battle of wits typical of the adversarial system of oral hearing which is in sharp contract to the inquisitorial traditions of the "civil law" of France and other European and Latin American countries where written submissions have the pride of place and oral arguments are considered relatively insignificant. Considering the traditionally recognized role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C P C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters, falling outside the subject-matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by itself duly authorized agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction arrears in Court by elimination of uncertainties and enlargement of the scope of compromise. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power of attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by vakalatnama, act on behalf of his client. Not to recognize such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in Court, if the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

5. In the light of this decision the decision reported in 1991 (1) KIT 292 is no more good law.

6. There was an earlier decision by the Supreme Court itself on the same point interpreting the amended provision which was reported in *Gurpreet Singh Vs. Chatur Bhuj Goel*, . There the court held that after the amendment the advocate concerned has no authority to enter into a compromise and the compromise has to be signed by the parties in person. When there is a later decision by a bench of equal strength which has taken a contrary view on the matter, the law to be followed by this court is the law rendered in the later decision. Following the later decision I hold that for entering into a compromise it is not necessary that the party himself should sign it and it is enough that on behalf of the party the counsel signs the compromise.

7. The learned counsel for the appellant would submit that for entering into a compromise under Order XXIII Rule 3 it is necessary that an application is filed to that effect and whether such an application is necessary or not was not considered in the Supreme Court decision and for the reason that no application was filed in this case the compromise has to be ignored. Order XXIII Rule 3 does not say that for compromising a suit an application is necessary. No doubt, in the decision reported in 1991 (1) KLT 292 the learned Judge has taken the view that an application also is a must for effecting compromise. That view does not seem to gain support from the later decision of the Supreme Court referred to earlier. Even though the question whether an application was necessary or not has not been specifically raised in that case the discussion would show that the only requirements, are that the compromise should be in writing (no particular form is insisted nor any application or documents) and signed by the parties. It may be also by the counsel having vakalath for party. So the argument that an application is a must cannot be accepted.

8. Defendants 1 to 3 have not joined the compromise. The judgment shows that it was submitted that the suit against the first defendant was not pressed and accordingly, the suit against the first defendant was dismissed. Defendants 2 and 3 were expert, A compromise decree is binding on the expert defendants also unless challenged before a proper forum and set at naught. Defendants 2 and 3 who were expert before the trial court have been served with, notice and they did not choose to appear either in the trial court or in this appeal. The appellants who are parties to the compromise are not entitled to question the binding nature of the compromise on the ground that certain expert defendants have not joined the compromise. A compromise which has not been signed by all the parties, for that reason alone, is not a nullity and the court is not recording such a compromise without jurisdiction has been ruled in Sheo Behari Lal v. Mahrand Singh and others (AIR 1935 Oudh 358). It was held:-

Where the case is not one of the Court passing a decree against certain persons on the basis of a compromise to which they were not parties but merely one of a decree being passed in terms of the compromise against persons, against whom were expert, no question of want of jurisdiction or of the decree being a nullity arises. The defect is no more than one of an irregular exercise or improper assumption of jurisdiction. The persons aggrieved may have their remedy by means of proper proceedings against the irregularity complained of, but they cannot in the circumstances treat the decree as a nullity.

I am in respectful agreement with that proposition.

The decree and judgment are not challenged on any other ground. in view of the discussion above. It is clear that the appeal is devoid of merits. The appeal is dismissed but in the circumstances without costs.